IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1432 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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MAHMOOD RAJASA SAIYED - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MR HASHIM QURESHI for the Appellant.
MR LR PUJARI, ADDITIONAL PUBLIC PROSECUTOR for the Opponent.

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 17/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal, preferred by the appellant under Section 34 of Prevention of Terrorism Act, 2002 (“POTA”, for short), was filed in the year 2004. The matter could have been disposed of in its ordinary course but for the adjournments sought by the learned Advocate for the appellant from time to time, resulting the matter to be listed on the Board for nearly two years. Be that as it may, let the appeal see light of the day. It is, therefore, heard and disposed of once for all.

2. The appellant was arrested in connection the POTA Case bearing No. 12 of 2003 arising out of I-CR No. 6 of 2003 of the DCB Crime Police Station, Ahmedabad for the offences punishable under Section 120B, 121A, 122, 123 of IPC, Section 25(1)(a), 25(1)(b), 27 and 29 of the Arms Act as well as under Sections 3(1)(a), 3(1)(b), 4, 20, 21(2)(b), 22(3)(a), 22(3)(b) of the POTA. The present appeal is directed against the order dated 24th June, 2004 passed by the learned Special Judge (POTA), Ahmedabad, in Miscellaneous Criminal Application No. 1381 of 2004 rejecting grant of bail to the appellant.

3. Mr. Hasim Qureshi, learned Advocate for the appellant, submitted that even though no material was shown suggesting the connection of the appellant with the crime, as contemplated under Section 120B of IPC, the bail application preferred by the appellant was rejected. The learned Judge ought to have considered the confessional statement of the co-accused Anas

Machiswala in proper perspective and released the appellant on regular bail, as set out in the application. The learned Judge has erred in holding that the appellant participated in the conspiracy and there was enough material against him indicating *prima facie* involvement in the commission of crime. The learned Judge has erred in holding that as the appellant played a vital role in the criminal conspiracy, he is not entitled to be enlarged on bail. The learned Judge ought to have held that the statement of the co-accused recorded under Section 32 of the POTA is not binding to the accused and, therefore, it was a fit case to release the appellant on regular bail. The learned Advocate for the appellant further submitted that as the appellant is in judicial custody for more than two years, the rigours of sub-section (6) of Section 49 would not apply to the facts of the present case and, therefore, the appellant is liable to be enlarged on regular bail. Thus, the learned Advocate, in view of the averments made in the application, submitted that the appellant has made out a case for his release on bail, as prayed for in the memo of appeal. The appellant would abide by the terms and conditions which the Hon'ble Court may deem fit to impose on him if he is released on bail.

4. As against the aforesaid submissions, Mr. L. R. Pujari, learned Additional Public Prosecutor representing the State, vehemently submitted that there was sufficient material available against the

appellant and, therefore, the learned Judge has rightly rejected the bail application preferred by him. The confessional statement of the co-accused indicating the involvement of the other accused can be considered at the time of the trial and, therefore, the submission canvassed by the learned Advocate for the appellant requires to be rejected out of hand. It is contended by the learned Additional Public Prosecutor that the appellant was found in possession of revolver and foreign pistol and it is also reflected in the *panchnama*. The learned Additional Public Prosecutor placed reliance on the statement of the co-accused recorded under Section 32 of the POTA and submitted that *prima facie* on the perusal of those statements, the involvement of the appellant in the commission of the offence is established and, therefore, the learned Judge has rightly rejected the bail application of the appellant. Taking into account the involvement of the appellant in the commission of offence, the gravity of the offence and the material which was available against the appellant, the appeal preferred by the appellant does not call for any interference and the same is liable to be rejected.

5. The learned Additional Public Prosecutor has placed reliance on the judgment rendered by the Hon'ble Apex Court and reported in **Kalyan Chandra Sarkar Vs. Rajesh Rajan @ Pappu Yadav And Another, 2004 (7) SCC 528** in support of the submission that the Court has to take into consideration: (a) the

nature of accusation and the severity of the punishment in case of conviction and the nature of supporting evidence, (b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant, and (c) *prima facie* satisfaction of the Court in support of the charge. Thus, taking into account the ratio laid down by the Hon'ble Apex Court and the *prima facie* involvement of the appellant in the commission of crime, the appeal preferred by the appellant is liable to be rejected.

6. This Court has heard Mr. Hashim Qureshi, learned Advocate for the appellant, and Mr. L. R. Pujari, learned Additional Public Prosecutor for the respondent-State, at length and in great detail. This court has also undertaken a complete and comprehensive appreciation of all vital features of the case.

7. The appellant was arrested in connection the POTA Case bearing No. 12 of 2003 arising out of I-CR No. 6 of 2003 of the DCB Crime Police Station, Ahmedabad for the offences punishable under Section 120B, 121A, 122, 123 of IPC, Section 25(1)(a), 25(1)(b), 27 and 29 of the Arms Act as well as under Sections 3(1)(a), 3(1)(b), 4, 20, 21(2)(b), 22(3)(a), 22(3)(b) of the POTA. The appellant was found in possession of country-made revolver and foreign made pistol and the same was recovered from his pocket. The *panchnama* in respect thereof was prepared. The joint *panchnama,* which was prepared, also mentions

about the 10 live cartridges which were recovered from another accused Mohd. Tarik. The statements of the co-accused recorded under Section 32 of the POTA have been perused by us and *prima facie*, the statements given by the co-accused indicate involvement of the appellant in the commission of crime. The contention raised by the learned Advocate for the appellant that the statement of the co-accused Anas Machiswala does not disclose *prima facie* involvement of the appellant is without any substance, as notification under Section 4 of the POTA was in effect when the accused was charge-sheeted, and since the accused was charge-sheeted for the offence punishable under Section 120B, which is for criminal conspiracy, we see was no reason to enlarge the appellant on regular bail. With regard to the statement of co-accused, which was recorded under Section 32 of the POTA, save and except the statement recorded under Section 32 of the POTA, further corroboration was also forthcoming. Thus, the Court has to look into the entire material which was available against the accused. The *prima facie* evidence was available against the appellant and as he was found in possession of the fire-arms, the learned Special Judge has rightly not used the discretion to enlarge the appellant on bail and we also see no reason to interfere with the order passed by the learned Judge in appeal preferred by the appellant under Section 34 of the POTA. As regards the next submission of learned Advocate for the appellant that the accused has remained in judicial

custody for nearly two years, we have considered the provisions of sub-sections (6) and (7) of Section 49 of the POTA and the rigours imposed therein. The rigours would definitely go with the completion of the period of one year as contemplated under sub-section (7) of Section 49 of the POTA, but considering the provisions of Section 439 of the Code of Criminal Procedure along with evidence available against the accused, in our view, the accused has not made out a case for his enlargement on regular bail.

9. As a last submission, the learned Advocate for the appellant made an alternative prayer that if the Hon'ble Court is not inclined to enlarge the appellant on regular bail, the appellant, who is businessman and selling bags near Bhadra Temple, Ahmedabad, may at least be released on temporary bail for a period of two months so that he can earn his livelihood and maintain the members of his family during the aforesaid period. In our opinion, the prayer made by the learned Advocate does not have any substance, as, even today, in place of the appellant, his brother is taking care of his business and/or maintaining the members of family of the appellant and, therefore, we see no reason to grant the alternative prayer made by the learned Advocate for the appellant.

9. In view of the foregoing discussion, as the appellant has not made out a case for his release on bail, the appeal preferred by him is liable to fail.

Hence, we pass the following order:

O R D E R

The appeal fails and it is dismissed.

[ANIL R. DAVE, J.] [H. B. ANTANI, J.]

/shamnath